Supreme Court, U.S.
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No 95-____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

JOHN B. WALPOLE THEODORA W. WALPOLE,
JOHN B. WALPOLE, JR.
and WILLIAM E. WALPOLE,
D/B/A SUNNY POINT FARMS,
Petitioner,

v.

GREAT AMERICAN INSURANCE COMPANIES
AND AMERICAN NATIONAL
FIRE INSURANCE COMPANY,
Respondent.

Petition For A Writ of Certiorari To
The Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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69 pp

QUESTION PRESENTED FOR REVIEW

If a crop is destroyed by insured causes, may a private insurer reinsured by the FCIC under the Federal Crop Insurance Program avoid liability by misleading the farmer through its policy and agents, and escape state and common law remedies through the preemption doctrine?

LIST OF PARTIES

The parties to the proceeding below were the Petitioners, John B. Walpole, Theodora W. Walpole, John B. Walpole, Jr. and William E. Walpole, d/b/a Sunny Point Farms, and the Respondents, Great American Insurance Companies and American National Fire Insurance Company.

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PETITION FOR WRIT OF CERTIORARI

The Petitioners, John B. Walpole, Theodora W. Walpole, John B. Walpole, Jr. and William E. Walpole, d/b/a Sunny Point Farms, respectfully pray that a *Writ of Certiorari* issue to review the May 25, 1995 judgment and opinion of the United States Court of Appeals for the Fourth Circuit, and the July 6, 1995 denial of their Petition for Rehearing in the above captioned proceeding.

OPINIONS BELOW

The Opinion and Judgment of the United States Court of Appeals for the Fourth Circuit dated May 25, 1995 is not reported and is reprinted in the Appendix hereto at App. 1, *infra*.

The United States Court of Appeals' denial of Petitioners' Petition for Rehearing and Suggestion for Rehearing En Banc dated July 6, 1995 is reprinted in the Appendix at App. 3, *infra*.

The Order denying summary judgment, of the United States District Court for the District of South Carolina, Charleston Division, The Honorable David C. Norton presiding, of March 16, 1994 was not reported, and is reprinted in the Appendix at App. 7, *infra*. The subsequent Order of the same court, granting summary judgment to Respondents, of August 29, 1994, is not reported and is reprinted in the Appendix at App. 16, *infra*.

STATEMENT OF JURISDICTION

Petitioners seek review from the Opinion and Judgment of the United States Court of Appeals for the Fourth Circuit of May 25, 1995. Petitioners' subsequent Petition for Rehearing was denied on July 6, 1995. The Supreme Court

Court has jurisdiction to review cases in the Court of Appeals by *Writ of Certiorari* by virtue of 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Federal Crop Insurance Act, 7 U.S.C. § 1501, *et seq.* at § 1508(A) provides that crop insurance "shall be against loss of the insured commodity due to unavoidable causes..." Relevant portions of this act are set forth in the Appendix at App. 37, *infra*.

STATEMENT OF THE CASE

Petitioners John B. Walpole and Theodora W. Walpole d/b/a Sunny Point Farms, ("Walpole") purchased a crop insurance policy for their 1992 tomato crop under the Federal Crop Insurance Program. Great American Insurance Companies ("Great American") was the private insurer, and the policy was reinsured by the Federal Crop Insurance Corporation ("FCIC"). Following severe weather damage (an insured event) when harvesting of the crop had already begun, Walpole sought guidance from Great American as to how he should proceed. Great American either gave no advice or encouraged Walpole to harvest his crop, with the result that he incurred further, uninsured harvesting costs, but, as the lower court held, thereby lost his right to coverage.

Subsequently, Great American denied most of Walpole's claim. Walpole sued Great American and the FCIC. The FCIC moved to be dismissed from this case asserting that it had no interest in the outcome, and the court entered an order dismissing the FCIC.

Following discovery, the parties filed cross motions for summary judgment.

The court initially denied Great American's motion, holding that it must be determined at trial whether Walpole's crop was totally destroyed, and whether his sale of the damaged tomatoes was a "salvage" rather than "harvest". At a status conference prior to trial, Great American orally renewed its summary judgment motion, and the court concluded that it had previously misread the "unambiguous" policy and that no trial was necessary. The court held that, even if Walpole had proceeded based on the assurances of the insurance adjusters, and even if he incurred further (uninsured) losses in picking and selling his crop, the sale of tomatoes under any circumstances any price precluded recovery under the policy. Moreover, the preemption doctrine prevented him from recovering from the insurer based on state law theories.

Walpole appealed. On May 25, 1995, the United States Court of Appeals upheld the district court's order. On July 6, 1995, the United States Court of Appeals for the

Fourth Circuit rejected Walpole's Motion for Rehearing and Suggestion for Rehearing En Banc.

REASONS FOR GRANTING THE WRIT

THE LOWER COURT ALLOWED A PRIVATE INSURER TO ESCAPE STATE LAW AND COMMON LAW LIABILITY BASED UPON A MISREADING OF CONGRESSIONAL INTENT IN THE FEDERAL CROP INSURANCE PROGRAM

This Petition asks the Court to determine the applicability of state and common law legal principles to cases arising under the Federal Crop Insurance Program, and to address the proper construction of federally-approved crop insurance policies under the Crop Insurance Act.

Although analysis of the situation presented in the present case depends upon the technicalities of a complex crop insurance policy (discussed below), the legal issues are familiar ones. Walpole and other similarly affected farmers were promised insurance in all stages of production, both in the policy itself as well as the Crop Insurance Act. Yet the claims process takes away this promise. State insurance law would read this as an ambiguity and construe the policy in favor of coverage. *Brooklyn Bridge, Inc., v. South Carolina Insurance Co.*, 420 S.E.2d 511 (S.C. App. 1992); *cf. A.W.G. Farms, Inc. v. Federal Crop Insurance Corp.*, 757 F.2d 720 (8th Cir. 1985). Further, the adjusters failed to inform

Walpole of any actions he could take to protect his right to insurance. If state law principles of estoppel do not apply against a federally reinsured insurer, other contract law does, and the Eighth Circuit has held that the obligation of good faith and fair dealing binds even the FCIC in a contract. *Id.* Further, the Fifth Circuit has held that the FCIC cannot adopt unreasonable interpretations of its own policies. *Wilson v. U.S. Department of Agriculture,* 991 F.2d 1211, 1217 (5th Cir. 1993). Among Walpole's state law claims was one for unjust enrichment, since he lost money in effecting the harvest of his crop that Great American now has used as a reason to avoid paying his claim. Finally, the Act itself states that insurance "shall" be against loss by unavoidable causes. 7 U.S.C. § 1508. At the summary judgment stage, Walpole has made a showing of crop loss by unavoidable causes. Review by the Court is needed to determine whether the preemption doctrine allows the FCIC and its insurers to enforce an insurance policy that charges the farmer for insurance in the fourth stage of production, but in fact provides none at all.

The lower court held, essentially, that since Walpole picked and sold his crop, it "counts against" him and must count against his recovery even though the tomatoes themselves were damaged and were sold at a loss because of the high cost of picking and packing. These costs are not "production" costs and are not insured, and were incurred after damage to the crop that should have terminated the policy. The court ignored provisions in the policy that apparently precluded recovery for tomatoes of any quality left

in the field and not picked thus eliminating all coverage during the fourth stage. The Crop Insurance Act, which mandates insurance for damaged crops, state insurance law, and principles of good faith and fair dealing indicate that Walpole is entitled to recovery. *See A.W.G. Farms, Inc. v. Federal Crop Insurance Corp.*, 757 F.2d 720 (8th Cir. 1985). The court focused on the fact that Walpole picked, and not on the reasons that he felt compelled to do so. Since the policy and the adjusters apparently told Walpole he could not recover based on the damaged crop in the field, he had no choice but to pick, and the insurer under state law could not use Walpole's picking to deny coverage.

The policy involved in this case is a "production" policy, that is, one that pays fixed amounts to the farmer for damage to tomatoes on the vine during "production". The policy covers part of the cost of growing, but none of the cost of harvesting, the crop. Coverage ends the moment a tomato is picked. Any damage to tomatoes after they are picked is not compensable, and the costs of picking and packing are not included in the production guaranty.

Under the policy, the farmer receives a "production guaranty" that represents a percentage of his average annual yield, measured in number of cartons of tomatoes per acre.[1]

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[1]The farmer elects which production level he wishes. Walpole elected 65% of his average crop. The guaranty is not prorated, but attaches to any losses only as they exceed the total uninsured portion of the crop. Thus, a loss of 35% percent of his crop would give rise to no claim, and a loss of

His coverage approximates the cost of producing the crop up to the growth stage at which any loss occurs. This ranges from $1.23 at the time of planting to $2.45 when the tomatoes are ready to pick.

When a crop is damaged by insured causes, the total indemnity is reduced by the value of any portion of the crop that was ineligible for insurance. This "counts against" the farmer. Walpole's predicament was that, under the reading of the policy adopted by Great American and the lower court, he could not avoid having all his tomatoes count against him, even though his crop was destroyed by bad weather.

Some of the factors that "count against" the farmer include 1) losses of tomatoes which are damaged by uninsured causes, 2) "harvested production" (that is, tomatoes which were actually harvested and proved to be "number 1's", which are the normal quality tomato the farmer seeds to grow), 3) "appraised production" (that is, tomatoes which were not harvested but which could have been harvested) and, finally, 4) those tomatoes which are "marketed". At issue in this case is whether tomatoes are considered "marketed" if they are sold after the policy period is ended following a loss.

40% would give him a claim for the costs of growing 5% of his average annual yield. Total loss of his crop would entitle him to recover the costs of growing 65% of his crop.

To calculate a claim, the adjuster begins with the guarantee level, representing a percentage of the annual yield, and subtracts from that number the number of all tomatoes to be counted against the farmer, including actual and appraised production. The resulting figure represents the compensable lost production, and is multiplied by the dollar figure corresponding to the stage of production reached.

This case involves an unusual circumstance because Walpole's crop was damaged in the fourth and final stage of production, and damage was so widespread as to render Walpole's crop a total loss. Under the interpretation of the policy urged by Great American and adopted by the lower courts, there would be no way for Walpole to recover for the loss. Such an interpretation runs counter to state and common law insurance law principles, and also frustrates the mandate of the Federal Crop Insurance Act, which provides that "insurance shall be against loss of the insured commodity due to unavoidable causes..." 7 U.S.C. § 1508(A). The policy also places the parties in a position where it is easy for an insurer to take advantage of the farmer. This has resulted in a conflict between the circuits as to the application of state and common law principles to the federal crop insurance program.

On its face, the policy appears to carry out the congressional purpose of affirmatively providing insurance against unavoidable crop loss. Since the cost of production increases as the growing season progresses, the policy provides that the farmer's recovery similarly increases, and

the policy promises 100% recovery for losses incurred in the fourth (harvest) stage of production.[2] Unfortunately, as Walpole realized when he was faced with a loss during harvest, the policy fails to make clear how a farmer may actually recover for such a loss.

The reason for that is that the policy states that the farmer's claim should be reduced by "appraised production", which includes only #1 tomatoes that have been harvested, but **all tomatoes, regardless of grade,** in the field.[3] Obviously, any crop that reaches the harvest stage would have a relatively full yield in the field, even if the tomatoes became damaged and essentially worthless.

That was the dilemma faced by Walpole. His crop was virtually destroyed, but the policy appeared to preclude recovery if the damaged crop was left in the field. Encouraged by the adjusters, Walpole picked his crop. This confirmed his original assessment that the crop had been totally destroyed, since it produced virtually no #1 tomatoes. According to the policy, the #2 tomatoes picked by Walpole, if left in the barn, could have served as the basis for a claim. However, since the cost of picking exceeded the cost of

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[2]"100 percent" recovery means that the farmer receives 100% of his selected coverage level, up to 75% of the arbitrary cost of production established in the policy.

[3]Tomatoes in the field must be a minimum size, but in the fourth stage of production most of the crop far exceeds this minimum.

production, and far exceeded any insurance recovery Walpole could hope for, leaving the crop in the barn would merely have increased Walpole's loss. To recoup the cost of picking, he therefore sold the low quality tomatoes at a steeply discounted price.

Thus, in the exceptional circumstance of a harvest time disaster, there was no way Walpole could obtain insurance coverage: if he left the crop in the field, even the damaged tomatoes counted against him; if he harvested the tomatoes, the cost of picking would far exceed any insurance proceeds he could recover; finally, if he picked the crop and confirmed that it had been damaged, he could recoup the cost of picking by selling the crop at a discount, but under Great American's reading of the policy, he could then not recover for the damage to the crop.

The reading of the policy adopted by Great American results in the paradoxical situation that, while the policy promises 100% recovery in the fourth stage of production, and while the Federal Crop Insurance Act mandates crop insurance for losses due to unavoidable causes, the structure of the claims mechanism contained in the policy makes it impossible for a farmer to derive any benefit from the policy he has purchased. The ordinary remedies for this would be two-fold: (1) applying ordinary state and common law principles of construction, state courts would construe the insurance contract against the drafter, and in favor of coverage, or (2)

in the actual dealings between the insured and the insurer, some practical solution could be discovered for the problem.

In this case, the lower court determined that all state law remedies were pre-empted by the Federal Crop Insurance Act. Further, both the district court and the court of appeals declined Walpole's request that they follow an eighth circuit case, *A.W.G. Farms, Inc. v. Federal Crop Insurance Corp.*, 757 F.2d 720 (8th Cir. 1985), thereby creating a conflict between the circuits.

In *A.W.G.*, a similar situation arose in the case of federally insured sugar beets. In that case, production of beets would count against the farmer without appraisal if the beets were "accepted" and sold. The sugar content of the crop was substandard, but the insurance adjusters encouraged the farmer to mitigate his damages by selling the beets anyway for the best price possible. The farmer sold the beets at a sharp discount, since the sugar content was low. Later, the insurer took the position that, since the beets had been sold, they were therefore "acceptable" and the entire amount of production should "count against" the farmer. The eighth circuit Court of Appeals ruled in favor of the farmer based on a two-prong approach. First, the court applied ordinary state law principles of construction and held that insurance contracts must be read in favor of coverage. The court thus held that "acceptable" implied certain minimum of quality standards. The mere fact that it was possible to dispose of a crop in hand for a price did not mean that the crop was "acceptable" as

defined in the policy. Therefore, the substandard crop, although ultimately sold, would not preclude the farmer from receiving the insurance he had purchased.

Second, the Eight Circuit Court of Appeals held that, even though estoppel may not apply against the government, nevertheless the principles of good faith and fair dealing did apply, and the actions of the adjusters who encouraged the farmer to harvest and sell his crop displayed a bad faith effort to extricate the insurer from its obligations under the contract.

In contrast, the court in this case rejected the approach taken by the eighth circuit, and ruled against Walpole on summary judgment, holding that it was unnecessary to make findings of fact as to what representations might have been made to Walpole at the time he made his decision to go forward with the picking of his crop. In essence, the court held that federal preemption was so sweeping in effect as to allow a federally reinsured private insurer to make any representations at all to a farmer without having any effect on its liability. Additionally, the Court failed to recognize the ambiguity inherent in a policy that purports to give full coverage during the fourth stage of production, but in fact makes it impossible as a practical matter for the farmer to realize any benefit from the insurance policy in the unusual circumstance of unavoidable damage to a crop in the fourth stage of production.

CONCLUSION

For the reasons stated above, this *Petition for Writ of Certiorari* should be granted, and the court should allow the Petitioner to file his brief in order to set forth in greater detail the legal and factual basis of his claim. If this Petition is not granted, the congressional purpose behind the Federal Crop Insurance program will be frustrated, and the lower courts will be left without guidance as to the impact of state and common law on the interpretation of federal crop insurance and federally reinsured crop insurance contracts.

Respectfully submitted,

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October __, 1995

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 94-2208

JOHN B. WALPOLE, THEODORA W. WALPOLE,
JOHN B. WALPOLE, JR. and
WILLIAM E. WALPOLE, d/b/a
SUNNY POINT FARMS,

Plaintiffs - Appellants,

vs.

GREAT AMERICAN INSURANCE COMPANIES;
AMERICAN NATIONAL FIRE
INSURANCE COMPANY,

Defendants - Appellees.

On Petition for Rehearing with
Suggestion for Rehearing En Banc

The appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no

member of this Court or the panel requested a poll on the suggestion for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the court,

Bert M. Montague, Clerk

APPENDIX B

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 94-2208

JOHN B. WALPOLE, THEODORA W. WALPOLE,
JOHN B. WALPOLE, JR. and
WILLIAM E. WALPOLE, d/b/a
SUNNY POINT FARMS,

Plaintiffs - Appellants,

vs.

GREAT AMERICAN INSURANCE COMPANIES;
AMERICAN NATIONAL FIRE
INSURANCE COMPANY,

Defendants - Appellees.

Appeal from the United States District Court for the District of South Carolina, at Charleston. David C. Norton, District Judge.
(CA-92-2434-2-18)

Argued: May 2, 1995
Decided: May 25, 1995

Before MURNAGHAN and MOTZ, Circuit Judges, and YOUNG, Senior United States District Judge for the District of Maryland, sitting by designation.

Affirmed by unpublished per curiam opinion.

ARGUED: Charles S. Altman, FINKEL, GOLDBERG, SHEFTMAN & ALTMAN, P.A., Columbia, South Carolina, for Appellants. Richard Benjamin Ness, EARLEY & NESS, Bamberg, South Carolina, for Appellees.

ON BRIEF: Gilbert Scott Bagnell, FINKEL, GOLDBERG, SHEFTMAN & ALTMAN, P.A., Columbia, South Carolina, for Appellants.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

PER CURIAM:

John B. Walpole, Theodora W. Walpole, John B. Walpole, Jr., and William E. Walpole, collectively d/b/a Sunny Point Farms, appeal from the district court's order of summary judgment in favor of Great American Insurance Companies and American National Fire Insurance Company. This action arose out of a multiple peril crop insurance policy issued to the Walpoles by Great American covering the Walpoles' 1992 tomato crop. The policy was reinsured by the Federal Crop Insurance Corporation. Federal jurisdiction is proper pursuant to 7 U.S.C. § 1508 (j)(2)(A) (Federal Crop Insurance Act) and 28 U.S.C. § 1331. There is also diversity of citizenship between the parties.

In July, 1992, just prior to harvest, a major storm damaged several acres of the Walpoles' tomato plants. The Walpoles harvested the damaged tomatoes, sold them, and filed a claim with Great American under the policy, for which Great American paid them $108,000.00. The Walpoles subsequently filed this action seeking declaratory judgment as to the correct indemnity due and damages for various state law causes of action.

Specifically, with regard to their insurance claim, the Walpoles asserted that the language of the policy was ambiguous as to their obligations under it and as to the method of calculating their claim for indemnity, and that these

ambiguities should be construed in their favor. Alternatively, they maintained that Great American was estopped from denying them the indemnity sought. The district court rejected both arguments. It concluded that under the clear and unambiguous language of the policy the damaged tomatoes were properly "counted against" the Walpoles' indemnity claim and that the policy did not otherwise insure against market risk or picking and packaging costs. The court also concluded that there was no basis for estoppel.

Finally, the district court rejected the Walpoles' state law causes of action. The court held that those claims, which counsel has conceded were all contract-related, were preempted under the Federal Crop Insurance Act.

Upon review of the pleadings, briefs, and argument of counsel, we find no error, and affirm on the basis of the thorough opinions of the district court. Walpole v. Great American Ins. Cos., C.A. No. 2:92-2434-18 (D.S.C. March 16, 1994 and August 29, 1994).

Accordingly, the district court's order granting summary judgment to Great American Insurance Companies and American National Fire Insurance Company is

AFFIRMED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

JOHN B. WALPOLE and THEODORA W. WALPOLE, JOHN B. WALPOLE, JR., and WILLIAM E. WALPOLE, d/b/a SUNNY POINT FARMS,	C.A. 2:2434-2-18
Plaintiffs,	
vs.	
GREAT AMERICAN INSURANCE COMPANIES and AMERICAN NATIONAL FIRE INSURANCE COMPANY,	ORDER
Defendants.	

This matter is before the court upon Plaintiffs' and Defendants' cross Motions for Summary Judgment, pursuant to Fed. R. Civ. P. 56. A hearing was held on these matters on February 4, 1994.[1]

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[1]At the hearing, the court dismissed Plaintiffs' pendent state law claims finding that the state law causes of action were preempted by federal law. See *Brown v. Crop Hail Mgt., Inc.*, 813 F. Supp. 519 (S.D. Tex. 1993) & *State of Kansas Ex. Rel. Todd v. United States*, 791 F. Supp. 1491 (D. Kan. 1992), aff'd, 995 F. 2d 1505 (10th Cir. 1993).

I. BACKGROUND

This is a declaratory judgment action, arising from the loss of part of Plaintiffs' 1992 tomato crop due to adverse weather. Plaintiffs seek a declaration of the indemnity due from this court, claiming far greater indemnity was due than was paid. The main dispute is over the construction of an insurance policy.[2]

Plaintiffs operate a large farming operation known as Sunny Point Farms (hereinafter "Sunny Point") where they grow fresh market tomatoes. Defendant American National Fire Insurance company (hereinafter "American National" or "Insurer") is a division of Defendant Great American Insurance Companies (hereinafter "Great American"). Plaintiffs purchased a multiple peril crop insurance policy from American National to insure Plaintiffs' tomato crop from loss due to various adverse weather conditions. The Federal Crop Insurance Corporation (hereinafter "FCIC"), an entity of the federal government, reinsures the policy at issue.[3]

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[2]There is also a dispute as to whether Plaintiffs continued picking of the tomatoes after the storm was a "harvest" or "salvage," thereby rendering a dispute as to when the insurance ceased. The court finds, as explained later, that this dispute precludes summary judgment.

[3]There are two types of crop insurance policies authorized and governed by the Federal Crop Insurance Act. The first is a policy issued directly by the FCIC. The second type is issued by private insurance companies, with language approved by the FCIC, and reinsured by the FCIC. Although their provisions are similar, the two policies need not be, and are not, identical. Plaintiffs in the case at bar purchased a policy of the latter type. The policy

During the 1992 policy year, Plaintiffs experienced an early frost loss and the tomato crop was replanted. Because of continuing adverse weather conditions, the new crop again failed. Around July 1, 1992, a major storm occurred which knocked down a great number of the tomato plants, snapping the poles which held them up and damaging the tomatoes. This event caused Plaintiffs to call American National. Agents of American National came to the Walpole farm on July 2 or 3 1992, and met with John Walpole. The parties agree that they had a discussion as to the meaning of the policy at issue. There is a dispute among the parties as to what was said and as to what was done following this visit from the American National agents.[4]

As of July 2, 1992, Plaintiffs had hundreds of acres of storm damaged tomato plants with broken down stakes. John Walpole picked the weather damaged tomatoes. The parties dispute the meaning of this picking - was it a "salvage" or a

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at issue is a guaranteed production plan policy covering the year of 1992.

[4]This court acknowledges that because the rights of the parties under the policy are determined by the policy rather than their opinions about the policy, the content of this discussion will not vary clear and unambiguous policy language. The problem the court has, however, is that there is a dispute as to which policy provision applies; that is, were Plaintiffs' actions after the storm representative of a "harvest" or a "salvage." A determination as to whether there was a "harvest" or a "salvage" is necessary to determine what policy provision applies. Once this dispute is resolved, the clear, unambiguous language of the policy will govern.

"harvest?"[5] Plaintiffs sold all tomatoes that they picked and they picked all tomatoes in their fields.

II. SUMMARY JUDGMENT STANDARD

To grant a motion for summary judgment, this court must find that "there is no genuine issue as to any material fact . . ." Fed. R. Civ. P. 56(c). In evaluating a motion for summary judgment, this court must view the record in the light most favorable to the non-moving party. Perini Corp. v. Perini Constr., Inc., 915 F.2d 121, 123-24 (4th Cir. 1990). The judge is not to weigh the evidence himself but rather to determine if there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986).

The moving party is entitled to judgment as a matter of law if the nonmoving party fails to make a sufficient showing on an essential element of its case. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). If the moving party has carried its burden of establishing the absence of genuine issues of material fact, the nonmoving party "may not rest upon mere allegations or denials" of its pleading, Fed. R. Civ. P. 56(e), but must produce sufficient evidence to reasonably

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[5]Plaintiffs refer to their post-storm picking as a "salvage" operation; that is, the salvage of a totally destroyed crop. Defendants characterize Plaintiffs' actions as a "harvest." Although the label itself may not be important, the actions of the parties are important in determining when the insurance period ceased.

support a jury verdict in its favor. *Anderson*, 477 U.S. at 249.

> The non-moving party 'must do more than simply show that there is some metaphysical doubt as to the material facts.' [Cite omitted]. 'The mere existence of a scintilla of evidence in support of [the non-moving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for [the non-moving party]. [Cite omitted].

Catawba Indian Tribe v. South Carolina, 978 F.2d 1334, 1339 (4th Cir. 1992). See also *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364 (4th Cir. 1985) ("Genuineness means that the evidence must create fair doubt; wholly speculative assertions will not suffice. A trial, after all, is not an entitlement. It exists to resolve what reasonable minds would recognize as real factual disputes"). However, "[w]here states of mind are decisive as elements of a claim or defense, summary judgment ordinarily will not lie." Overstreet v. Kentucky Central Life Ins. Co., 950 F.2d 931 (4th Cir. 1991).

III. ANALYSIS

Before resolving the policy construction issue in this declaratory judgment action, the question of whether this case involves a "salvage" of a totally destroyed tomato crop or whether this case involves a "harvest" of a damaged tomato crop must be resolved. The court cannot, as a matter of law, resolve this issue. "[T]here . . . [are] genuine issue[s] as to . . . material fact[s]" regarding this question. Fed. R. Civ. P. 56(c). The determination of whether there was a "salvage" or a "harvest" is a prerequisite to the determination of when the

insurance policy ended; and, in turn, a determination of which policy provision applies to the case at bar.

The parties positions are as follows. Plaintiffs take the position that their crop was totally destroyed on July 2, 1992. Assuming this to be true for the moment, the policy would have terminated according to its terms, and Plaintiffs argue that they would be due compensation for their total loss as it occurred on that date. Plaintiffs argue that their recovery would have been unaffected either by the costs of subsequent cleanup or any proceeds they might have realized through salvage operations as they cleared the lost crop from the fields. Plaintiffs rely on the following policy provisions:

> 1. INSURANCE PERIOD
>
> Insurance on insurable acreage on a per acre basis will attach at the time the tomatoes are planted and will cease upon the earliest of:
>
> a. final adjustment of a loss;
> b. discontinuance of harvest;
> c. the date harvest would normally have started on any acreage which was not harvested;
> d. 120 days after the date of planting or replanting;
> e. the date harvest is completed;
> f. the date the insured tomato crop is destroyed, as determined by us; or
> g. September 20 of the calendar year in which the tomatoes are normally harvested.

Special Provisions, p. 1 of 4 (para. 1.a.-g.).

7. PRODUCTION GUARANTEES, COVERAGE LEVELS AND PRICES FOR COMPUTING INDEMNITIES

* * *

C. Any acreage of tomatoes damaged to the extent that growers in the area would not further care for the tomatoes will be considered by us to be total destruction of the crop. Your further care of the acreage of the damaged crop will not increase our liability on that acreage. The production guarantee for the destroyed acreage will be established by the stage that the destruction has occurred, as determined by us.

Id. at p. 3 of 4 (para. 7.c.).

Plaintiffs characterize the damage to the tomato crop as "total destruction" and characterize their post-storm picking of the tomato crop as a "salvage" operation. Plaintiffs assert that Defendants' adjusters made no field appraisal at the farm on July 2 or 3, 1992, and took no steps at that time to ascertain the exact extent of the damage. Defendants do not dispute this assertion. Instead, Defendants assert that no appraisal was required or appropriate at that time. Defendants state that they could not appraise or adjust the loss until the insurance ceased.

Defendants argue that the insurance had not ceased in accordance with the above quoted provision, as Plaintiffs claim. Defendants argue that as long as Plaintiffs "harvested"

the tomatoes, the insurance did not cease. Once Plaintiffs did discontinue "harvesting," then Defendants argue that the insurance ceased and the only appropriate question then is what production counts as an offset to the indemnity due. Defendants cite the following policy language as controlling in this case:

> The total production to be counted will be cartons from insurable acreage for the farm unit and will include all appraised and harvested production.

Special Provisions, p. 2 of 4 (para. 6.c.).

> Harvested production will include:
> (a) **all tomato production marketed; and**
> (b) any harvested **unmarketed** production meeting the standards for grading 85 percent or better U.S. no. 1's with classification size of 6 x 7 (2-8/32 inch minimum diameter) or larger.

Id. (para. 6.c.(2) (a) & (b)) (emphasis added). Defendants argue that this language is clear and unambiguous, and it requires that Plaintiffs' indemnity be offset by all marketed production, regardless of grade. Defendants assert that they have paid Plaintiffs their entire indemnity due under that construction of the policy.[6]

The determination regarding the construction of the policy and the alleged ambiguity of policy provisions is saved for a later date. The court must first determine whether

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[6]Defendants calculated the gross indemnity due Plaintiffs to be $156,000.00, less unpaid premiums, with a net indemnity due of $108,000.00. Defendants have paid Plaintiffs this net sum of $108,000.00.

Plaintiffs' actions after the storm constituted a "salvage" or a "harvest;" thus, determining when the insurance period ceased - then, and only then, can the court apply the appropriate provisions of the insurance policy and determine if they create ambiguity.[7]

IV. CONCLUSION

It is therefore,

ORDERED, that Defendants' Motion for Summary Judgment be **DENIED.**

ORDERED, that Plaintiffs' Motion for Summary Judgment be **DENIED**.

AND IT IS SO ORDERED.

David C. Norton
United States District Judge

March ___, 1994
Charleston, South Carolina

[7]This court notes that should Defendants be found correct in their assertations as to which policy provisions apply, the court, as of this date, believes that it will be difficult to conclude the above quoted policy provision defining "harvested production" is ambiguous.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

JOHN B. WALPOLE and THEODORA W. WALPOLE, JOHN B. WALPOLE, JR., and WILLIAM E. WALPOLE, d/b/a SUNNY POINT FARMS,	)	C.A.2:92-2434-18
Plaintiffs,	)	
vs.	)	
GREAT AMERICAN INSURANCE COMPANIES and AMERICAN NATIONAL FIRE INSURANCE COMPANY,	)	**ORDER**
Defendants.	)	

This matter is before the court upon Defendants' renewed Motion for Summary Judgment, pursuant to Fed. R. Civ. P. 56. Summary Judgment Motions were filed by all parties and argued before the court on February 4, 1994. The court issued its order, filed on March 16, 1994, denying the Cross-Motions for Summary Judgment. Subsequently, Defendants renewed their Summary Judgment Motion at a status conference before the court on June 24, 1994. The court thereafter invited counsel to submit memoranda regarding their respective positions as to paragraph 6.c.(1)(d)(iii) of the insurance policy, the so-called "catch-all"

provision which Defendants contend requires that all marketed tomatoes count against the farmer irrespective of whether the insurance period has ended or not.

Specifically, the court is asked to review policy language previously argued but not discussed in its order filed on March 16, 1994, denying Summary Judgment Motions. Defendants assert the insurance language, section 6.c.(1)(3)(iii), is dispositive of the "salvage" versus "harvest" issue. Plaintiffs claim their tomato picking after July 2, 1992, is a "harvest" or a "salvage" makes absolutely no difference, and that the cessation of the insurance period has absolutely no bearing on how the harvested production should be determined.

I. BACKGROUND

This is a declaratory judgment action, arising from the partial loss of Plaintiffs' 1992 tomato crop due to adverse weather. Plaintiffs seek a declaration of the indemnity due, claiming far greater indemnity was due than was paid. Not surprisingly, the main dispute is over the construction of an insurance policy.

Plaintiffs operate a large farming operation known as Sunny Point Farms (hereinafter "Sunny Point") where they grow fresh market tomatoes. Defendant American National Fire Insurance Company (hereinafter "American National" or "Insurer") is a division of Defendant Great American Insurance Companies (hereinafter "Great American").

Plaintiffs purchased a multiple peril crop insurance policy from American National to insure Plaintiffs' tomato crop from loss due to various adverse weather conditions. The Federal Crop Insurance Corporation (hereinafter

"FCIC"), an entity of the federal government, reinsures the policy at issue.[1]

During the 1992 policy year, Plaintiffs experienced an early frost loss and the tomato crop was replanted. Because of continuing adverse weather conditions, the new crop again failed. Around July 1, 1992, a major storm occurred which knocked down a great number of the tomato plants, snapped the poles which held them up- and damaged the tomatoes. This event caused Plaintiffs to call American National.

Agents of American National came to the Sunny Point farm on July 2 or 3, 1992, and met with John Walpole. The parties agree that they had a discussion as to the meaning of the policy at issue. There is a dispute among the parties as to what was said and as to what was done following this visit from the American National agents.[2]

As of July 2, 1992, Plaintiffs had acres of storm damaged tomato plants with broken down stakes. John

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[1]There are two types of crop insurance policies authorized and governed by the Federal Crop Insurance Act. The first is a policy issued directly by the FCIC. The second type is issued by private insurance companies, with language approved by the FCIC, and reinsured by the FCIC. Although their provisions are similar, the two policies need not be, and are not, identical. Plaintiffs in the case at bar purchased a policy of the latter type. The policy at issue is a guaranteed production plan policy. .

[2]Because the rights of the parties under the policy are determined by the policy rather than their opinions about the policy, the content of this discussion is irrelevant to the question of coverage.

Walpole picked the weather damaged tomatoes. Plaintiffs sold all tomatoes that they picked.[3]

II. SUMMARY JUDGMENT STANDARD

To grant a motion for summary judgment, this court must find that "there is no genuine issue as to any material fact . . . ." Fed. R. Civ. P. 56(c). In evaluating a motion for summary judgment, this court must view the record in the light most favorable to the non-moving party. Perini corp. v. Perini Constr., Inc., 915 F.2d 121, 123-24 (4th Cir. 1990). The judge is not to weigh the evidence himself but rather to determine if there is a genuine issue for trial Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986).

The moving party is entitled to judgment as a matter of law if the nonmoving party fails to make a sufficient showing on an essential element of its case. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). If the moving party has carried its burden of establishing the absence of genuine issues of material fact, the nonmoving party "may not rest upon mere allegations or denials" of its pleading, Fed. R. Civ. P. 56(e), but must produce sufficient evidence to reasonably support a jury verdict in its favor. *Anderson*, 477 U.S. at 249.

> The non-moving party 'must do more than simply show that there is some metaphysical doubt as to the material facts.' [Cite omitted].

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[3]This case only involves tomatoes that were picked and sold or, in the words of the policy language, harvested production that was marketed. This declaratory judgment action is therefore concerned with the construction of the language that appears in the Special Provisions of the insurance policy at para. 6.c.(2)(a).

> 'The mere existence of a scintilla of evidence in support of [the non-moving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for [the non-moving party].' [Cite omitted].

Catawba Indian Tribe v. South Carolina, 978 F.2d 1334, 1339 (4th Cir. 1992). See also *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364 (4th Cir. 1985) ("Genuineness means that the evidence must create fair doubt; wholly speculative assertions will not suffice. A trial, after all, is not an entitlement. It exists to resolve what reasonable minds would recognize as real factual disputes"). However, "[w]here states of mind are decisive as elements of a claim or defense, summary judgment ordinarily will not lie." Overstreet v. Kentucky Central Life Ins. Co., 950 F.2d 931 (4th Cir. 1991).

III. ANALYSIS

In its previous order, this court stated:

> Before resolving the policy construction issue in this declaratory judgment action, the question of whether this case involves a "salvage" of a totally destroyed tomato crop or whether this case involves a "harvest" of a damaged tomato crop must be resolved. The court cannot, as a matter of law, resolve this issue. "[T]here . . . [are] genuine issue[s] as to . . . material fact[s]" regarding this question. Fed. R. Civ. P. 56(c). The determination of whether there was a "salvage" or "harvest" is a prerequisite to the determination of when the insurance policy period ended; and, in turn, a determination of which policy provision applies to the case at bar.

Order, p. 5.

Defendants have asserted that this court erred in its prior ruling. Defendants assert that paragraph 6.c.(1)(d)(iii) of the Multiple Peril Crop Insurance Special Provisions, Fresh Market Tomatoes - Production Plan (hereinafter "Special Provisions") is dispositive of this case, rendering summary judgment in their favor. Paragraph 6.c.(1)(d)(iii) states:

> 6. CLAIM FOR INDEMNITY
>
> * * *
>
> c. The total production to be counted will be cartons from insurable acreage for the farm unit and will include all appraised and harvested production.
>
> (1) Appraised production will include:
>
> * * *
>
> (d) potential production of unharvested acreage for which we have given consent to put to another use. The indemnity for the farm unit may be determined without regard to such appraisal when such acreage is:
>
> * * *
>
> (iii) harvested . . . .

Special Provisions, p. 2 of 4 (para. 6.c.(1)(d)(iii)). This

matter has been thoroughly briefed and is ready for a ruling from this court. As seen below, this court agrees with Defendants that paragraph 6.c.(1)(d)(iii) of the policy's Special Provisions should have been discussed in its previous order and that paragraph 6.c.(1)(d)(iii) is dispositive of this case.

A. Catch-All Provision - Special Provisions, Paragraph 6.c.(1)(d)(iii)

In the policy's Special Provisions, the insurance period is defined pursuant to provision 1 as follows, in pertinent part:

> Insurance on insurable acreage on a per acre basis will attach at the time the tomatoes are planted and will cease upon the earliest of:
>
> * * *
>
> b. discontinuance of harvest;
>
> * * *
>
> e. the date harvest is completed;
> f. the date the insured tomato crop is destroyed, as determined by us; . . .

Special Provisions, p. 1 of 4 (para. 1.b.,e. & f.).

Items 1.b. and 1.e. allow for the insurance period to end at the discontinuance of harvest or upon completion of harvest. Defendants assert harvest continued for a number of weeks after the July 2 storm. Plaintiffs deny that they "harvested" tomatoes after the storm, but agree that after the post-storm tomatoes were "salvaged" they were sold at

market.

Provision 1.f. appears to be the provision relied on by Plaintiffs in this action. Plaintiffs take the position that their crop was destroyed on July 2, 1992. Plaintiffs argue that the policy should have terminated according to its terms on that date, thereby rendering them due compensation for their total loss as it occurred on July 2, 1994.[4] Plaintiffs argue that their recovery would have been unaffected either by the costs of subsequent cleanup or any proceeds they might have realized through "salvage" operations as they cleared their lost crop form the fields. Throughout this case, Defendants have argued tat no appraisal was required or appropriate at the time that the adjusters visited the Sunny Point farm on July 2 or 3, 1992. Defendants have stated that they could not appraise or adjust the loss until the insurance ceased and the insurance could not cease where Mr. Walpole continued to "harvest" his damaged, but not destroyed, tomato crop. The court, in its prior order, declined to award summary judgment to either Plaintiffs or Defendants based on the dispute as to the characterization of Mr. Walpole's continued picking after the storm - "salvage vs. harvest."

Defendants assert that the prior reasoning of this court, the "salvage vs. harvest" issued raised in the prior order, does not involve a genuine or material issue precluding summary judgment because the policy provides a "catch-all" provision which requires that all marketed tomatoes count against the farmer whether the insurance period has ended or not. Paragraph 6.a. provides as follows:

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[4]Plaintiffs apparently take the position that if <u>they</u> determine the crop to be destroyed, the policy terminates. Plaintiffs fail to acknowledge the clear language of para. 1.f. - "as determined by us." Pursuant to the policy, Defendants determine when a crop is destroyed.

> You must establish the total production of tomatoes on the farm unit and any loss of production that has been directly caused by one or more of the insured causes during the insurance period for the crop year for which the indemnity is claimed.

Special Provisions, p. 2 of 4 (para. 6.a.). Paragraph 6.c. provides:

> The total production to be counted will be cartons from insurable acreage for the farm unit and will include all appraised and harvested production.

Id. (para. 6.c.). Paragraph 6.c.(1)(d)(iii) provides:

> The indemnity for the farm unit may be determined without regard to such appraisal when such acreage is . . . harvested.

Id. (para. 6.c.(1)(d)(iii)).

Harvested production includes all tomato production marketed, regardless of the date picked or sold. Since the court finds no ambiguity in the definition of "harvested production,"[5] all tomato production marketed should be

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[5]See infra p. 13-20 (discussion on the construction of the insurance policy). In its prior order, this court stated:

> [S]hould Defendants be found correct in this assertions as to which policy provisions apply, the court . . . believes that it will be difficult to conclude that the . . . policy provision defining "harvested production" is ambiguous.

counted as harvested production. Thus, the present issue before the court on this renewal of summary judgment is whether provision 6.c.(1)(d)(iii) requires all tomatoes, regardless of when picked, to be counted as harvested production, not just those tomatoes picked prior to July 2, 1992.

Defendants contend that if the insurance period ended due to any reason, an appraisal would have been conducted. If a discontinuance of harvest had been announced, or if the harvest had been completed, or if the insurer deemed the crop destroyed, Defendants contend that the insurance period would have ended, and an appraisal would have been required since no more tomatoes would have been picked.

The adjusters from American National went to the farm soon after the storm. The farm was inspected by the adjusters. Mr. Walpole thereafter decided that he would continue picking the tomatoes. This picking, no matter if defined as a "salvage" or a "harvest," in and of itself, precluded a determination of total destruction.

Under the terms of the policy, whether the insured crop is totally destroyed is for the insurance company to determine. See Special Provisions, p. 1 of 4 (para. 1.f.). The farmer had the option, at the time of the discussions with the adjusters, to discontinue harvest. If Defendants deemed the crop destroyed or the farmer ceased harvest, the insurance period would have ended. Neither occurred.

Order, p. 8 n. 7. The court now concludes that the policy provision defining "harvested production" is clear and unambiguous and explains its reasoning later in this order.

In the Multiple Peril Crop Insurance General Provisions (hereinafter "General Provisions"), para. 5.d. provides the policy requirements which must be complied with after crop damage. That provision states:

> Without delay give us notice in the event that any farm unit is damaged to the extent that you do not expect to further care for the crop; do not intend to harvest any or all of the crop or wish to put the acreage to other use.

General Provisions, p. 2 of 3 (para. 5.d.).

The record shows that no notice that the farm unit was damaged to the extent that the crop would not be further cared for, or that Plaintiffs did not intend to harvest any or all of the crop, was ever communicated to Defendants. Therefore, no appraisal was conducted.

Regardless of the content of the discussions between the adjusters and Mr. Walpole, the parties' actions show that no insurance period ending actions occurred, and no appraisal was necessary or appropriate until harvest was complete. See id. The adjusters did not declare that the crop was destroyed when the visited the farm. This is evident from the fact that they did not order an appraisal of the crop at this time. Mr. Walpole continued to pick tomatoes after the date of his meeting with the adjusters. Had the insurance period ended, the appraisal would have been conducted pursuant to Special Provision 6.c.(1). This provision sets forth the applicable appraisal factors. Defendants argue that paragraph 6.c.(1)(d)(iii) would be activated if an appraisal had been necessary and the farmer had decided to further harvest (or "salvage") after the insurance period had ceased, even if an appraisal had been conducted. In other words, if any further

tomatoes had been picked and sold after the end of the insurance period, the appraisal would be disregarded, and the sales would then be counted as harvested production. Defendants argue that to calculate the claim otherwise would be inequitable and contrary to the plain language of the policy. This court agrees. Whether the crop was "destroyed" or not, whether it was appraised or not, all tomatoes picked and sold from the 1992 crop, at any time, must count as harvested production under 6.c.(1)(d)(iii).

To construe 6.c.(1)(d)(iii), the court must consider the meaning of the language and why it was placed in the policy. It permits the indemnity on a farm to be determined without using or applying an appraisal in the event such acreage (farm unit) is later picked. In essence, there would be no need for an appraisal if the acreage is actually harvested, because the "potential production" is not harvested production. That is precisely what happened in this case. If the harvest is not stopped, no appraisal is needed to determine production left in the field. Instead, production is determined by what was harvested. If harvest is stopped, an appraisal would be needed to determine what is left in the fields. If that production is then picked, it is "harvested." The drafters of the regulations and policy never included the word "salvage" in any of its documents. This court concludes that under the policy at issue tomatoes picked and marketed, even after an alleged total destruction, must be included in harvested production.[6]

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[6]The parties were directed to submit supporting case law for their positions. Apparently, there is none to be found for either view, except administrative decisions which provide some guidance to the court. Defendants submit the case of Joe Todd Farms. Although the Joe Todd Farms case involves an administrative appeal and is not binding on this court, it is instructive on the FCIC's interpretation of harvested production and how tomatoes sold should be counted, even if the tomatoes are considered

B. Construction of Policy Language

This declaratory judgment action is over the construction of the policy purchased by Plaintiffs. The pertinent language in dispute appears in the Special Provisions portion under the heading "Claim for Indemnity" and states:

> The total production to be counted will be cartons from insurable acreage for the farm unit and will include all appraised and harvested production.

Special Provisions, p. 2 of 4 (para. 6.c.).

> Harvested production will include:
>
> (a) **all tomato production marketed; and**
> (b) any harvested **unmarketed** production meeting the standards for grading 85 percent or better U.S. No. 1's with classification size of

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"salvage."

In the Joe Todd Farms administrative appeal, there were approximately 10,000 boxes of tomatoes which apparently did not meet grade to be sold as fresh market tomatoes but were of sufficient quality that allowed them to be sold by the farmer to a cannery for a minimal price. Though the tomatoes were sold as "salvage" for 31 cents per box, the FCIC required them to be counted as production at $3.00 per box because they were sold, even though they were sold as post-destruction "salvage". The policy in the Joe Todd Farms case was a dollar plan policy which is different from the Guaranteed Production Plan in the case at bar; however, for the issues being discussed, Defendants argue, and this court agrees, that the policies are similar.

6 x 7 (2-8/32 inch minimum diameter) or larger.

Id. (para. 6.c.(2)(a) & (b)) (emphasis added).

Plaintiffs claim they are entitled to their guaranteed production level, less only those marketed tomatoes meeting the standard eighty-five (85) percent or better U.S. No. 1 tomatoes. Defendants contend that Plaintiffs' indemnity must be offset by all marketed production, regardless of grade. Defendants assert that they have paid Plaintiffs their entire indemnity due under that construction of the policy.[7] Plaintiffs seek a declaration of the indemnity due from this court, claiming far greater indemnity was due than was paid.

1. *Meaning of "Marketed"*

The words in the policy, when not defined therein, must be given their plain ordinary meaning. "Market" is defined in Webster's Dictionary as "to buy or sell." WEBSTER'S NEW WORLD DICTIONARY 828 (3d Edition 1988).[8] Plaintiff's tomatoes were sold. They were, therefore, marketed. Once any tomatoes were sold, those tomatoes became production to count against the production guarantee under the clear, unambiguous provisions of the policy, as further explained below.

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[7]Defendants calculated the gross indemnity due Plaintiffs to be $156,000.00, less unpaid premiums, with a net indemnity due of $108,000.00. Defendants have paid Plaintiffs this net sum of $108,000.00.

[8]See also BLACK'S LAW DICTIONARY 500 (5th Ed. 1983) (includes the phrase "purchase and sale" in its definition of "market").

2. *Policy Construction*

As to the proper construction of the policy, Defendants set forth their position as follows:

> The language of the policy issued clearly provides for marketed and harvested but unmarketed production to count in two distinct clauses. The unmarketed harvest to count is qualified by the standard of eighty-five (85%) percent U.S. Grade 1 or better. The marketed production is not so qualified. Harvested and marketed production includes all tomatoes sole, regardless of grade. The rationale behind the distinction is that a farmer ought not have his indemnity offset by tomatoes which are altogether unmarketable. By the same rationale, he ought not profit by insurance proceeds if he also profits by selling his crop. Where the crop is marketable but of a lower grade, whether to sell the tomatoes for a commensurate lower price or simply accept insurance proceeds with an offset for appraised production left in the field is a decision for the farmer to make as a businessman. Plaintiffs decided to harvest and sell all the tomatoes they could, having been fully advised the policy required all tomatoes sold to be counted against the indemnity.

Defendant's Memorandum in Support of Motion for Summary Judgment, p. 4 (filed August 9, 1993).

This court agrees with Defendants' position as set forth above. The Crop Insurance Act is remedial legislation. it is

intended only to insure a farmer's investment, not his profits. Mann v. FCIC, 710 F.2d 144, 147 (4th Cir. 1983), cert. denied, 104 S. Ct. 997 (1984) (farmer's indemnity must be offset by entire value of peanuts produced, including amount grained by storing production for a time). Plaintiffs agree that the insurance policy at issue is intended only to insure Plaintiffs' investment, not their profits.[9] All of Plaintiffs' marketed production must be counted under the plain language of the policy. There is no further indemnity due Plaintiffs. Defendants properly calculated and rendered the indemnity due Plaintiffs.[10]

Plaintiffs claim that the adjusters for Defendants instructed them to harvest and implied that the harvest would not offset against the indemnity. Besides being irrelevant where there is clear and unambiguous policy language, see infra p. 18, this assertion is also contrary to the April 20, 1993 deposition testimony of John Walpole. In his deposition, John Walpole, a Plaintiff in this action, as well as the head of Plaintiffs' farming operations, testified in his April 20, 1993 deposition: "And I think the big issue was whether I--what should I do; should I continue harvesting, or should I just send everybody back home.: John Walpole Deposition, p. 69 (lines 18-20). When asked if the adjuster told him what his options were, he said, "No, he didn't." Id. at p. 73 (line 23). While the adjusters were present on the farm reviewing the damage, it was clear to all present that there was a dispute as to the coverage provided by the policy, according to Mr.

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[9]Plaintiffs' counsel agreed with this statement at the hearing before this court held on February 4, 1994.

[10]See Dennis Strickland Affidavit (explains the method of calculating the indemnity due in this claim, pursuant to what this court finds to be clear, unambiguous policy provisions).

Walpole's testimony. Id. at p.77 (line 19) - 78 (line 6) & p. 78 (lines 17-23). Mr. Walpole further testified that the adjuster commented he knew mr. Walpole would harvest the crop. Id. at p. 79 (lines 3-4). In response, Mr. Walpole said, "I didn't plant that crop . . . for insurance coverage, I'm a farmer and I know what I've got to do, I've got to salvage, I got to do the best I can." Id. (lines 4-7). To this, he testified the adjuster responded, "You just go on and pick . . . and we'll come back with the checkbook." Id. (lines 7-9). Mr. Walpole responded, "I know-I disagree, with you, . . . I'm just saying I read it differently than you and we'll have to worry about that later." Id. (lines 10-12). This testimony shows that there was apparently a dispute among the parties at the farm that day regarding policy language as to which tomatoes would count against indemnity due and that Mr. Walpole continued to harvest in the face of Defendants' view that there would be an offset for all marketed tomatoes, regardless of grade.

Mr. Walpole further testified that he had information from another farmer in his area that the same policy interpretation had been conveyed to that farmer as to the offset for all marketed tomatoes, regardless of grade. Id. at p. 80 (line 24) - 81 (line 24). This testimony of John Walpole, who is the only Plaintiff or witness for Plaintiffs who was present for all of every meeting with the adjusters, is consistent with Defendants' position that he was not instructed to harvest and was told that there would be an offset for all marketed tomatoes, regardless of grade.

Even if the adjusters had made the statements as claimed by Plaintiffs, i.e. told Plaintiffs to go ahead and

harvest and they would be back with the checkbook,[11] Defendants' adjuster's statements cannot be applied to extend coverage where there is none because the doctrine of estoppel cannot extend coverage beyond that authorized by the policy. Mann, 710 F.2d at 147 (FCIC agents mistakenly told farmer bonus would not count and the court found that "[a]n agent of the FCIC could not extend crop insurance where there was none because the doctrine of estoppel cannot extend the coverage beyond that authorized by Congress and the rules promulgated by the FCIC."). "The farmer is charged with knowledge of the . . . policy . . . ." Id. Plaintiffs cannot rely on estoppel principles to expand the coverage provided by the policy.[12]

Plaintiffs' claims as to the method of calculating indemnity are directly contrary to the language of the policy purchased by them. Plaintiffs cannot rely on the representations of others as to the policy's contents. An

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[11]This court notes that Defendants' agents' comment that "they would be back with the checkbook" was apparently not a misleading statement. Defendants have paid Plaintiffs $108,000.00, presumably by check.

[12]In FCIC v. Merrill, 68 S. Ct. 1 (1947), plaintiffs reseeded 400 of their 460 acre wheat crop and advised agents of the FCIC of that fact. The agents informed them the entire crop was insurable. After most of the crop was destroyed, their claim was denied, based on the reseeding. (The agents had not mentioned the reseeding on the application). The Court noted the hardship of the case, but held that where federal crop insurance is involved and the FCIC will pay the loss, the representations of the agents cannot expand the coverage and estop the insurer. The Court noted that federal crop insurance is not just another form of insurance but a government remedial program whose costs are borne by the federal treasury. For that reason, the insured must be charged with notice of the regulations and policy provisions, which will not be disregarded.

The court finds that the Merrill and Mann holdings are equally applicable to FCIC reinsured policies, as well as FCIC directly issued policies.

insured has a duty to read the policy he purchases and to abide by its plain terms. There is no ambiguity requiring construction. The plain language is available to the court and is easily discernible. "[C]ourts should not torture the meaning of the policy to extend coverage not intended by the parties." Allstate Ins. Co. v. Best, 728 F. Supp. 1263, 1266 (D.S.C. 1990). Where the policy language for calculating a loss is clear and unambiguous, it must be given its "plain, ordinary, and popular meaning." Reid v. Life Ins. Co. of North America, 718 F.2d 677, 680 (4th Cir. 1983).[13] The method of calculating as provided by the policy is the method that must be used. All Plaintiffs' marketed production was properly included in production to count as an offset to the indemnity due.

Lastly, Plaintiffs cite an internal FCIC appeal case from Maryland, Butler Farms, to assert that the policy language is ambiguous. Apparently, there was some dispute as to the proper reading of an FCIC issued insurance policy in that case. Plaintiffs assert that the dispute in that case shows that the policy is ambiguous. The court, however, does not agree with Plaintiffs' argument. Like Joe Todd Farms, Butler Farms has no precedential affect on this court and, it is interesting to note, that the result in that case supports Defendants' construction of the policy - that all marketed production must be counted as an offset against indemnity. Furthermore, the policy in this action is clearer than FCIC issued policy, in that its punctuation clearly indicated that

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[13]This rule is consistent with United States District Judge Traxler's order in Knight v. American Nat'l Fire Ins. Co., Civil Action No. 4:91-3584-21 (D.S.C. March 24, 1993) (unpublished order).

marketed production is not qualified by any grading standard.[14] The plain language of the policy at issue must prevail.

IV. CONCLUSION

Summary judgment is proper under Fed. R. Civ. P. 56 where there remains no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Celotex Corp., 477 U.S. 317. Summary judgment is appropriate in the case at bar. The plain language of the policy provides that all Plaintiffs' marketed tomatoes, regardless of grade or the date of picking, must be counted as production to offset against indemnity due. Any instructions or representations made by Defendants, if any were made, cannot vary the clear terms of the policy. Plaintiffs are entitled to their guaranty level, less all marketed production. They have already been indemnified to that extent. It is therefore,

ORDERED, that Defendants' Motion for Summary Judgment be **GRANTED**.

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[14]The FCIC policy is not punctuated like the policy issued to Plaintiffs. In Plaintiffs' policy, the semicolon [;] between subsections (a) and (b) of the definition of "harvested production" indicates a clear intention to separate the two phrases. Special Provisions, p. 2 of 4 (para. 6.c.(2)). This separation by the semicolon supports this court's finding that the language is unambiguous and that only subsection (b) is qualified by the grading standards. Id.

AND IT IS SO ORDERED.

David C. Norton
United States District Judge

August __, 1994
Charleston, South Carolina

APPENDIX E

MULTIPLE PERIL CROP INSURANCE

GENERAL PROVISIONS

* * *

5. YOUR DUTIES AFTER CROP DAMAGE.

In case of damage to each crop insured under this policy you must:

a. Protect the crop from further damage by providing sufficient care.

* * *

d. Without delay give us notice in the event that any farm unit is damaged to the extent that you do not expect to further care for the crop; do not intend to harvest any or all of the crop; or wish to put the acreage to other use.

The acreage may not be put to another use or the insured crop(s) destroyed until we have made an appraisal of the potential production of such acreage and given consent for such other use. Such consent will not be given until it is too late or impractical to replant the insured crop(s).

* * *

6. OUR DUTIES AFTER A REPORTED LOSS.

a. We will adjust all losses that are timely reported to us.

* * *

c. We may defer the adjustment of a loss(es) until the amount of loss can be measured. We will not pay for additional damage resulting from your failure to provide sufficient care for the crop(s) during the deferral period.

d. Adjustment Procedures.
We recognize and apply the Loss Adjustment Procedures used by the Crop Insurance Industry.

APPENDIX F

MULTIPLE PERIL CROP INSURANCE
SPECIAL PROVISIONS
FRESH MARKET TOMATOES--PRODUCTION PLAN

1. INSURANCE PERIOD.

Insurance on insurable acreage on a per acre basis will attach at the time the tomatoes are planted and will cease upon the earliest of:

a. final adjustment of a loss;
b. discontinuance of harvest;
c. the ate harvest would normally have started on any acreage which was not harvested;
d. 120 days after the date of planting or replanting;
e. the date harvest is completed;
f. the date the insured tomato crop is destroyed; as determined by us; or
g. September 20 of the calendar year in which the tomatoes are normally harvested.

2. CAUSES OF LOSS.

The "Causes of Loss" in Provision No. 3 of the General Provisions CHIAA 700 are amended as follows:

a. Causes of Loss Insured Against:

The insurance provided is against unavoidable loss of production resulting from the following causes occurring within the insurance period:

(1) adverse weather conditions;
(2) fire;
(3) wildlife;
(4) earthquake;
(5) volcanic eruption; or
(6) failure of the irrigation water supply due to an unavoidable cause occurring after the beginning of planting.

* * *

6. CLAIM FOR INDEMNITY.

a. You must establish the total production of tomatoes on the farm unit and any loss of production that has been directly caused by one or more of the insured causes during the insurance period for the crop year for which the indemnity is claimed.

b. Indemnities will be determined separately for each farm unit. The amount of indemnity for any farm unit will be determined as follows:

(1) Multiply the insured acreage by the stage production guarantee;
(2) Subtract therefrom the total production of tomatoes to be counted;

(3) Multiply the remainder by the price election; and

(4) Multiply this result by your share.

c. The total production to be counted will be cartons from insurable acreage for the farm unit and will include all appraised and harvested production.

(1) Appraised production will include:

(a) potential production lost due to uninsured causes;

(b) not less than the production guarantee for any acreage which is abandoned or put to another use without our consent;

(c) unharvested production of mature green and ripe tomatoes with classification size of 6 x 7 (2-8/32) inch minimum diameter) or larger remaining at the end of the insurance period; and

(d) potential production of unharvested acreage for which we have given consent to put to another use. The indemnity for the farm unit may be determined without regard to such appraisal when such acreage is:

(i) not put to another use before harvest of tomatoes becomes

general in the county and is reappraised by us;

(ii) further damaged by an insured cause before the acreage is put to another use and is reappraised by us; or

(iii) harvested.

(2) Harvested Production will include:

(a) all tomato production marketed; and

(b) any harvested unmarketed production meeting the standards for grading 85 percent or better U.S. No. 1's with classification size of 6 x 7 (2-8/32 inch minimum diameter) or larger.

d. We may determine the amount of production of any unharvested tomatoes on the basis of field appraisals conducted after the end of the insurance period.

7. PRODUCTION GUARANTEES, COVERAGE LEVELS AND PRICES FOR COMPUTING INDEMNITIES.

* * *

b. The production guarantee per acre for computing indemnities is progressive by stages of coverage for which the acreage qualifies. The stages and production guarantees are:

* * *

(4) Fourth Stage (final stage) - The earlier of 75 days after planting or the beginning of harvest; 100% of the production guarantee shown on your Schedule of Insurance.

c. Any acreage of tomatoes damaged to the extent that growers in the area would not further care for the tomatoes will be considered by us to be total destruction of the crop. Your further care of the acreage of the damaged crop will not increase our liability on that acreage. The production guarantee for the destroyed acreage will be established by the stage that the destruction has occurred, as determined by us.

* * *

12. ADDITIONAL DEFINITIONS

* * *

Damaged - The situation which occurs when a farm unit is not capable of producing a normal or expected yield due to insured perils.

Harvest - The picking of marketable tomatoes on the farm unit.

* * *

Loss - A condition that occurs when the insured crop yield falls below the production guarantee for the farm unit due to one or more of the named perils insured against.

* * *

Unharvested Production - The number of 25 pound cartons of mature green or ripe tomatoes with classification size of 6 x 7 (2-8/32 inch minimum diameter) or larger.

APPENDIX F

§ 1508. Agricultural commodity crop insurance

To carry out the purposes of this chapter the Corporation is authorized and empowered--

(a) **Insurance against loss authorized; percentage limitation; levels of protection; losses expected from coverage; report to Congress**

If sufficient actuarial data are available, as determined by the Board, to insure producers of agricultural commodities grown in the United States under any plan or plans of insurance determined by the Board to be adapted to the agricultural commodity involved. Such insurance shall be against loss of the insured commodity due to unavoidable causes, including drought, flood, hail, wind, frost, winterkill, lightning, fire, excessive rain, snow, wildlife, hurricane, tornado, insect infestation, plant disease, and such other unavoidable causes as may be determined by the Board. Except in the case of tobacco, insurance shall not extend beyond the period the insured commodity is in the field. For the purpose of the foregoing sentence, in the case of aquacultural species, the term "field" means the environment in which the commodity is produced. Any insurance offered against loss in yield shall make available to producers protection against loss in yield that covers 75 per centum of the recorded or appraised

average yield of the commodity on the insured farm for a representative period (subject to such adjustments as the Board may prescribe to the end that the average yields fixed for farms in the same area, which are subject to the same conditions, may be fair and just). In addition, the Corporation shall make available to producers lesser levels of yield coverage, including a level of coverage at 50 per centum of the recorded or appraised average yield, as adjusted. The Corporation shall not make available to producers any level of coverage in excess of 75 per centum of the recorded or appraised average yield, as adjusted. One of the price elections offered shall approximate (but be not less than 90 per centum of) the projected market price for the commodity involved, as determined by the Board. Insurance provided under this subsection shall not cover losses due to the neglect or malfeasance of the producer, or to the failure of the producer to reseed to the same crop in areas and under circumstances where it is customary to so reseed, or to the failure of the producer to follow established good farming practices. The Board may limit or refuse insurance in any county or area, or on any farm, on the basis of the insurance risk involved. Insurance shall not be provided on any agricultural commodity in any county in which the Board determines that the income from such commodity constitutes an unimportant part of the total agricultural income of the county, except that insurance may be provided for producers on farms

situated in a local producing area bordering on a county with a crop insurance program. The Corporation shall report annually to the Congress the results of its operations as to each commodity insured.

(2)

No. 95-643

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

JOHN B. WALPOLE, THEODORA W. WALPOLE, JOHN B. WALPOLE, JR. and WILLIAM E. WALPOLE, d/b/a SUNNY POINT FARMS,

Petitioners,

vs.

GREAT AMERICAN INSURANCE COMPANIES and AMERICAN NATIONAL FIRE INSURANCE COMPANY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Does the decision of the Fourth Circuit Court of Appeals present a special or important reason for granting certiorari in this case, where the court correctly apprehended and applied the laws governing federal crop insurance, estoppel, and preemption of state law causes of action, and the Petitioners' claims were contrary to the plain, unambiguous policy language?

PARTIES

Petitioners are individuals involved in, and doing business as, an unincorporated joint farming venture, Sunny Point Farms. Respondent, American National Fire Insurance Company, is an insurance company, and is the subsidiary of its parent company, Respondent, Great American Insurance Companies. Respondents are not publicly held corporations.

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APPENDIX

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No. 95-643

In The

Supreme Court of the United States

October Term, 1995

JOHN B. WALPOLE, THEODORA W. WALPOLE, JOHN B. WALPOLE, JR., AND WILLIAM E. WALPOLE, D/B/A SUNNY POINT FARMS,

Petitioners,

v.

GREAT AMERICAN INSURANCE COMPANIES AND AMERICAN NATIONAL FIRE INSURANCE COMPANY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

The Respondents, Great American Insurance Companies and American National Fire Insurance Company, respectfully request that this Court deny the Petition for Writ of Certiorari submitted by Petitioners, John B. Walpole, Theodora W. Walpole, John B. Walpole, Jr., and William E. Walpole, d/b/a Sunny Point Farms.

OPINIONS BELOW

This action was brought in the District of South Carolina seeking a declaratory judgment of the proper amount of indemnity due Petitioners on a policy of crop insurance issued pursuant to the Federal Crop Insurance Act (FCIA). Initially, the Federal Crop Insurance Corporation (FCIC) was a defendant, along with Respondents. The district court dismissed the action as to FCIC.

After extensive discovery, Petitioners and Respondents moved for summary judgment. The district court ultimately granted Respondents' Motion, and Petitioners appealed. On May 25, 1995, the Fourth Circuit Court of Appeals affirmed the ruling of the district court. Petitioners' Petition for Rehearing and Suggestion for Rehearing En Banc was denied June 6, 1995.

STATEMENT OF JURISDICTION

The Supreme Court of the United States has jurisdiction to review the decisions of the Courts of Appeals pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Article I, § 9, clause 7, United States Constitution.

7 United States Code §§ 1502, 1503, 1506(k), 1508(h), 1508(b)(3).

7 Code of Federal Regulations §§ 400.351, 400.352(a), 400.401(b)(2).

STATEMENT OF THE CASE

Petitioner John Walpole is a long-time tomato farmer in Charleston County, South Carolina. Prior to 1992, Petitioners (hereinafter "Walpoles") obtained crop insurance directly from FCIC. For the 1992 tomato season, the Walpoles purchased a reinsured production plan tomato policy from Respondents (hereinafter jointly referred to as "insurer") for the 1992 tomato crop. Early in the 1992 season, the Walpoles suffered crop damage which was adjusted without disagreement. Replanting benefits were paid by insurer.

Later during the season, on July 2, 1992, John Walpole called insurer's representatives and advised a storm had damaged the tomatoes. Insurer's adjusters went to the farm to view the tomato crop. While discussing the issues with the Walpoles, it became apparent John Walpole wanted the insurance policy interpreted contrary to the clear policy terms and FCIC regulations. As a result of the discussions between the parties, they called FCIC representative Charles Skinner regarding FCIC's position on the policy language and the required adjustment procedures. Skinner affirmed insurer's policy interpretation was correct and consistent with FCIC's interpretation. The disagreement and the substance of this action is entirely over the construction of the policy.

Insurer issued a multi-peril crop insurance policy insuring the Walpoles' tomato crop for loss from various causes. The policy was reinsured by FCIC, an entity of the federal government established by the Federal Crop Insurance Act, 7 U.S.C. § 1501, *et seq.* ("the Act" or "FCIA").

FCIC's rationale behind its program, policies, and regulations is to promote the national welfare by improving the economic stability of agriculture through a sound system of crop

insurance. Prior to the passage of the Act, private companies deemed crops too risky for participation. Since 1980, when Congress allowed FCIC to expand its program to cover all crops and counties, FCIC has largely relied on private insurance companies rather than directly issuing policies to farmers. The relationship of FCIC to the private insurers is governed by a reinsurance agreement between FCIC and the insurer, as well as statutory and regulatory requirements concerning issuance and adjustment of the policies.

The Act authorizes and governs two (2) types of crop insurance policies: policies directly issued by FCIC; and, policies issued by private insurance companies but reinsured by FCIC. Although their provisions are similar, the two (2) types of policies need not be, and are not, identical. FCIC's directly issued policies are printed verbatim in the Code of Federal Regulations. (FCIC is statutorily authorized to issue regulations governing crop insurance.) The Guaranteed Production Plan, Fresh Market Tomatoes, crop insurance policy is specifically codified as a regulation at 7 C.F.R. § 454.7(d), but the terms at issue in this action are those of the policy issued by Respondents.

The reinsured policies are only slightly differently worded, but provide the same coverage. FCIC must approve the policy language, and FCIC establishes its premiums, terms, and conditions. 7 U.S.C. § 1508(b)(3). FCIC subsidizes the farmer's premium and is required to pay operating and administrative costs of insurers for whom reinsurance is provided, to the extent those costs are covered by FCIC on its directly issued policies. 7 U.S.C. § 1508(h). All such policies include language explaining that FCIC has reinsured the policy and all terms, conditions, rights, and responsibilities thereto are subject to the Act and FCIC regulations.

The policy issued to the Walpoles consists of two parts: a

three-page "General Provisions" document; and, a four-page "Special Provisions, Fresh Market Tomatoes - Production Plan" document. The language central to this dispute appears in the Special Provisions at Page 2, Item 6(c) and 6(c)(2)(a). (*See* Petition, A.40) Item 6(c) provides as follows:

> The total production to be counted will be cartons from insurable acreage for the farm unit and will include all appraised and harvested production.

6(c)(2) provides as follows:

> Harvested Production will include:
>
> (a) all tomato production marketed; and
>
> (b) any harvested unmarketed production meeting the standards for grading 85 percent or better U.S. No. 1's with classification size of 6x7 (2-8/32 inch minimum diameter) or larger."

The discussions between the Walpoles and insurer's representatives centered around what would be "production to count." John Walpole asserted "production to count" would include only tomatoes which graded as U.S. No. 1. John Walpole was fully advised that the policy language quoted above required that all tomato production marketed would be considered as "production to count."

Prior to the policy's issue, the farmer's guaranty level must be established. In all cases, including this case, the farmer's total production history and yield in prior years must be considered in establishing the insurable guaranty level pursuant to FCIC

guidelines. There is no distinction between Grade 1, Grade 2, or Grade 3 tomatoes sold by the farmer. This benefits the farmer by allowing him to use all production from the prior years, regardless of grade, to establish his guaranty. Thus, the higher his prior production, the higher the guaranty level for the farmer in later years. Commensurately, when "production to count" is established during a loss calculation in a given year, all tomatoes which are marketed are likewise counted. No exception is made to omit lesser grade tomatoes from poor production years or to omit tomatoes harvested after the insurance period. In this case, Walpoles had the benefit of all prior production years in the setting of their guaranty. Theirs is a high guaranty due to their prior high production.

As the parties discussed these matters at Sunny Point Farms on July 2, 1992, the irrigation, fertilization, picking, packing, and selling of tomatoes continued. It is *significant* that no break or cessation of harvest or packing occurred. In the discussions between the parties, it is undisputed that John Walpole pressed the adjuster, marketing representative, and agent for advice on whether he should continue to harvest, pack, and market, or whether he should cease harvesting and declare his operation for 1992 ended. It was established below that neither the adjuster, Willie James Kelly, nor anyone else present, gave John Walpole any instructions or advice on what he should do, but only the insurance adjustment procedures which would follow his decision. The insurer's representatives are not farmers and cannot and should not give any advice on what farmers should do.

Petitioners were told the decision was solely theirs as businessmen, and, in the event they continued harvesting, then the insurer's representatives would return at the end of the harvest to determine the extent of loss. Petitoners were further made aware that, in the event they decided to cease the harvest, an appraisal would be conducted to determine "production to

count." Ultimately, Petitioners opted to harvest and market the crop. When market prices fell, the decision proved costly.

The central issue litigated below was whether the boxes of tomatoes which met the standard 85% or better U.S. Grade No. 1's would be the only "production to count," or whether the other 309,487 boxes which were harvested, boxed, and sold during this tomato season would also be included as "production to count." Walpoles asserted only U.S. Grade 1's (3200 boxes in this case) would count against the indemnity due under the policy. The policy language as set forth in 6(c)(2) of the Special Provisions provides all tomato production marketed will be included as "production to count." There is clearly no differentiation for any grade of tomato which is ultimately marketed. Therefore, pursuant to the plain and unambiguous language of the policy, all tomato production marketed (sold) will be counted and included in "production to count."

A second "issue" raised by Walpoles in this case is when the "policy period" ended.[1] For insurer, this is not an issue. The insurance period is set forth in the Special Provisions - Fresh Market Tomatoes - Production Plan, Item 1. (*See* Petition, A.39). Walpoles contend the policy period ended on July 2, 1992, when the storm damaged many tomato plants by breaking stakes and blowing over the plants. Walpoles *now* term this a total destruction. At no time prior to litigation did Walpoles contend the tomato crop was destroyed. It was not determined to be destroyed by insurer's representatives as is required by Paragraph 1(f) of the Special Provisions. (*See* Petition, A.39). Further, there was no (a) final adjustment of loss; or, (b) discontinuance of harvest. The insurance period ended when

---

1. Walpoles contend the farmer can pick and sell tomatoes after the insurance period ends, and keep the sale *and* insurance proceeds for the same tomatoes.

Walpoles completed their entire harvest and sales in late July. There was no destruction of the crop as stated by Petitioners.

Paragraph 1(f) of the Special Provisions provides that the insurer will determine if the tomato crop is destroyed. (*See* Petition, A.39). If that determination is made (*but* this crop was *not* deemed destroyed) a complete appraisal of tomatoes in the field would be required and conducted pursuant to Paragraph 6(c)(1) (Petition, A.41). All appraised production would be included as "production to count" and offset against any indemnity due. Walpoles' position disregards the Special Provisions, Section 6(c)(1)(d)(iii) (Petition, A.41-42), which provides if any tomatoes are harvested after the end of the insurance period, the appraisal is disregarded, and the sold tomatoes count as tomato production marketed.

In the district court, Walpoles characterized the harvesting of tomatoes after July 2 as a salvage operation. On appeal, they termed it a demonstration to document their loss. It is interesting to note in the Amended Complaint there was no discussion of "salvage."

The "production to count" was calculated in accordance with the terms of the policy requiring that all tomato production marketed be included as "production to count." The "production to count" is applied to guaranty level and it was determined Petitioners were entitled to $156,342.00, less the premium due ($47,743.00). It is undisputed a check has been issued to Walpoles in the amount of $108,599.00. Insurer contends no further indemnity is due or owing to Walpoles.

SUMMARY OF THE ARGUMENT

This case presents no issue appropriate for the Court's exercise of its discretionary jurisdiction. It presents no special or important reason for granting certiorari.

The decision of the Fourth Circuit Court of Appeals was consistent with the law of federal crop insurance and preemption, specifically *FCIC v. Merrill*, 332 U.S. 380, 68 S. Ct. 1, 92 L. Ed. 2d 10 (1947), and its progeny. Petitioners cannot use estoppel or state law claims to expand insurance coverage under FCIA beyond that established by the unambiguous policy.

REASONS FOR DENYING THE WRIT

The Petitioners do not satisfy the criteria applied by the Court in determining whether to grant a Writ of Certiorari. The decision of the Fourth Circuit Court of Appeals was consistent with the statutory (FCIA) and common law of this Court. Of particular relevance is *FCIC v. Merrill*, 332 U.S. 380, 68 S. Ct. 1, 92 L. Ed. 10 (1947), and the line of cases emanating from *Merrill*. The Court below properly held the plain and unambiguous language of the policy to be controlling as to the indemnity due thereunder. The Court further ruled correctly that state law causes of action could not be applied to provide indemnity or damages to petitioners beyond the coverage prescribed by the policy, which is governed by the FCIA.

I.

THE COURT SHOULD NOT EXERCISE ITS DISCRETIONARY JURISDICTION TO GRANT THE WRIT OF CERTIORARI, AS THE PETITION DOES NOT SATISFY THE COURT'S CRITERIA FOR GRANTING REVIEW.

"A review on writ of certiorari is not a matter of right, but of judicial discretion." Supreme Court Rule 10. The Petitioners have demonstrated no special or important reason for granting certiorari in this case, as required by Supreme Court Rule 10. The decision of the Fourth Circuit Court of Appeals does not meet any

of the reasons for review enumerated in Rule 10, nor does it present any other special or important reason.

The district court decision affirmed in the Court of Appeals correctly construed the unambiguous insurance policy at issue in this action. It analyzed the undisputed facts by applying the law of federal crop insurance, as set forth in *FCIC v. Merrill*, 332 U.S. 380, 68 S. Ct. 1, 92 L. Ed. 2d 10 (1947). Petitioners have cited no law from this Court or other circuits with which the opinion actually conflicts.

The Eighth Circuit case cited by Petitioners as conflicting, *A.W.G. Farms, Inc. v. FCIC*, 757 F. 2d 720 (8th Cir. 1985), is factually and legally distinguishable from this case, in that the *A.W.G. Farms* policy insured the *quality* of sugarbeets, while this policy insured only *quantity* of tomatoes. The harvesting and sale of the beets did not affect indemnity amounts, if the beets were of a deficient sugar content. Furthermore, Petitioners cite *A.W.G. Farms* to support their state law causes of action, but *A.W.G. Farms* does not address the preemption issue.

This Court's decision in *Merrill, supra*, disposes of the issues for which *A.W.G. Farms* is cited. Pursuant to *Merrill*, there can be no estoppel or state law causes of action based on statements or conduct of the adjusters. Statements or conduct regarding farming decisions cannot alter the clear and unambiguous terms of the policy governing production to count. Petitioners' only remedy was the coverage expressly provided by the policy. *Merrill, supra*. The Eighth Circuit Court of Appeal, by its decision in *A.W.G. Farms*, did not, and could not alter this Court's holding in *Merrill*. Petitioners' claims are disposed of by this Court's previous decision.

No special or important reason for granting certiorari having been shown, no review should be granted.

II.

THE DECISION OF THE FOURTH CIRCUIT COURT OF APPEALS WAS CONSISTENT WITH THE LAW OF FEDERAL CROP INSURANCE AND PREEMPTION.

Petitioners have requested this Court "determine the applicability of state and common law legal principles to cases arising under the Federal Crop Insurance Program, and to address the proper construction of federally-approved crop insurance policies under the Crop Insurance Act." (Petition for Writ of Certiorari, 6). This Court has already done so, in 1947, in *FCIC v. Merrill*, 332 U.S. 380, 68 S. Ct. 1, 92 L. Ed. 2d 10. In *Merrill*, this Court held the coverage provided by a federal crop insurance policy could not be expanded by the representations of the insurance company's agents and employees.

Petitioners' reliance on the *A.W.G. Farms* decision is misplaced. *A.W.G. Farms* does *not* create a conflict among circuits as to preemption. Preemption was not raised nor addressed as an issue in *A.W.G. Farms*. Perhaps if it had been, the resulting decision would have been different. The only lower court decisions on the issue of preemption have been in favor of preemption. In *State of Kansas, ex rel. Todd v. United States*, 995 F.2d 1505 (10th Cir. 1993), the Tenth Circuit Court of Appeals affirmed a district court ruling that state law causes of action are preempted by the FCIA and the regulations authorized by it. A similar ruling was reached in *Brown v. Crop Hail Management*, 813 F. Supp. 519 (S.D.Tex. 1993). There is no conflict among the circuits as to preemption, not even by reliance on *A.W.G. Farms*.

During the course of this action in the district court, Petitioners amended their Complaint to add several theories of recovery and state common law causes of action (breach of

contract, restitution, unjust enrichment, negligent misrepresentation, reformation, estoppel) not provided in the Federal Crop Insurance Act (FCIA).

7 U.S.C. § 1506(k) provides state laws are not applicable to Federal Crop Insurance Corporation (FCIC) contracts. FCIC regulations, 7 C.F.R. § 400.351 and § 400.352, preempt state law causes of action as to policies issued or reinsured by FCIC. 7 C.F.R. § 400.352 provides states have no authority "to promulgate rules or regulations, pass laws or issue policies *or decisions* that directly or indirectly affect or govern agreements, contracts or actions authorized by" the Federal Crop Insurance Corporation regulations. (emphasis added) 7 C.F.R. § 400.351 provides the regulations of the Federal Crop Insurance Corporation govern all policies of insurance insured or reinsured by FCIC, and contracts, agreements, or actions authorized by the FCIA and entered into or issued by FCIC. Also see 7 C.F.R. § 400.401(b). The preemptive regulations were adopted by FCIC after its program expanded to include reinsuring policies written by private companies. *Owen v. Crop Hail Management, Inc.*, 841 F. Supp. 297 (W.D. Missouri, 1994) (setting forth the history of FCIC reinsurance).

Even if this Court determines *A.W.G. Farms* applies, Petitioners cannot demonstrate bad faith on the part of Respondents' employees. Petitioners claim they were harmed by selling their crop and losing insurance proceeds. However, had they foregone harvest, the production abandoned in the field, including those adequately sized tomatoes which at the packing shed would have been culls, would be counted against them under the unharvested production provisions of the policy. This unambiguous provision prevents the insurance from creating a disincentive to harvest and mitigate losses.

This Court held in *Merrill*, *supra*, that estoppel cannot be

used to expand coverage beyond that provided by the policy and statutes. Under *Merrill*, all crop insurance regulations are binding on all who come within the provisions of FCIA. Absolute compliance with policy provisions, statutes, and regulations is required in actions involving federal crop insurance policies, whether directly issued by FCIC or reinsured by FCIC. *Merrill, supra*; *Mann v. FCIC*, 710 F. 2d 144 (4th Cir. 1983), *cert. denied*, 465 U.S. 1005, 104 S. Ct. 997, 79 L. Ed. 2d 230. This Court held the insured was not entitled to rely on statements by the insurer's employees which were contrary to policy provisions.

Regardless of whether a crop insurance policy is issued directly by FCIC or reinsured by FCIC, all indemnity payable under the policy will ultimately have one source — the federal treasury. It should be of no consequence that the policy is issued by a private insurer. This Court, in *Utah Power & Light Co. v. United States*, 243 U.S. 389, 37 S.Ct. 387, 61 L. Ed. 791 (1917), held the federal treasury would not be liable, even on the basis of misrepresentations of its agents, to do what was not authorized by law. Only the indemnity available under the FCIC-approved policy issued to Petitioners and authorized by statute can be awarded. *Office of Personnel Management v. Richmond*, 496 U.S. 414, 110 S.Ct. 2465, 110 L. Ed. 2d 387 (1990) (award of funds from federal treasury on estoppel theory would violate Appropriations Clause of United States Constitution, as an expenditure without authorization of Congress).

To reverse the decision of the Fourth Circuit Court of Appeals, this Court would be required to disregard the Federal Crop Insurance Act, ignore the Appropriations Clause of the United States Constitution, and abandon its prior holdings in *Merrill* and *Richmond*. The ruling of the Fourth Circuit was consistent with all of those, and the writ of certiorari should be denied.

III.

PETITIONERS' CLAIMS ARE CONTRARY TO THE PLAIN, UNAMBIGUOUS, LANGUAGE OF THE POLICY ISSUED.

Petitioners have made claims in this matter which are contrary to the plain, unambiguous, language of the insurance policy at issue. The policy issued was a production plan policy, meaning it insured petitioners would produce a given number of boxes of tomatoes (based on prior yields). The number of boxes deemed produced in the insured year is subtracted from the guaranteed yield, and the insured is paid for the deficiency, if any, at a price per box elected by him when the coverage is purchased.[2]

The formula for paying indemnity in an FCIC-reinsured policy is derived from the FCIC-approved policy. A farmer's prior yield over a number of years is used to calculate a guaranty level — what he should be able to produce each year. The farmer's indemnity is figured by multiplying the guaranty by the number of insured acres, then subtracting "production to count" (in numbers of boxes).

Pursuant to the policy, production is determined by counting unharvested[3] and harvested production. Harvested production includes marketed production, regardless of grade. Harvested production also includes picked, but unmarketed, tomatoes which would meet a standard of 85% or better U.S. No. 1 per box. (*See* Policy, Item 6c(2)(b), Petition, A.42.)

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2. Petitioners, on page 9, erroneously discuss the "costs of growing." The insurance does not pay the insured the actual cost of growing. It pays an elective price per box for the shortfall.

3. Unharvested production is not an issue in this case.

The chief issue in this case was whether the tomatoes sold by petitioners (but not meeting the standard 85% or better U.S. No. 1) must be counted. Clearly, the policy provides they must. The district court held all tomatoes sold by petitioners must count, and that there was nothing ambiguous about the policy. While petitioners were not paid indemnity for those boxes, they did receive sale proceeds for those tomatoes, which were sold at prevailing market prices, albeit in a depressed market.

The FCIA does not mandate a "perfect" crop insurance program. Certain losses will be uncompensated by insurance proceeds. Federal crop insurance is remedial legislation not intended to help a farmer make his usual profit. It is intended to compensate for disastrous losses, to an extent which prevents total loss of invested costs. That there are circumstances in which a farmer might have an uncompensated loss does not render the policy ambiguous. That two parties might disagree on its meaning and require a court's interpretation likewise does not render it ambiguous.

The policy is clear: "Harvested production will include . . . all tomato production marketed; . . .". It could not be stated more clearly. All tomatoes sold by petitioners must be offset against the indemnity. The district court and the Court of Appeals found the language clear. The result is that petitioners receive sale proceeds for sold tomatoes and insurance proceeds for their shortfall in quantity, not sale proceeds plus insurance indemnity on the same tomatoes, as they seek.

CONCLUSION

As set forth above, this case presents no special or important reason for this Court's review. It presents no novel issues or inter-circuit conflicts requiring resolution. The case has been decided in a manner consistent with this Court's prior decisions and sound policy construction. The Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A — RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

CONSTITUTIONAL PROVISIONS INVOLVED

"No money shall be drawn from the treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time." Article I, §9, clause 7, United States Constitution.

STATUTORY PROVISIONS INVOLVED

7 U.S.C. § 1502: "Declaration of purpose. It is the purpose of this title to promote the national welfare by improving the economic stability of agriculture through a sound system of crop insurance and providing the means for the research and experience helpful in devising and establishing such insurance."

7 U.S.C. § 1503: "Federal Crop Insurance Corporation; creation; offices. To carry out the purposes of this title, there is hereby created as an agency of and within the Department of Agriculture a body corporate with the name "Federal Crop Insurance Corporation" (herein called the Corporation). The principal office of the Corporation shall be located in the District of Columbia, but there may be established agencies or branch offices elsewhere in the United States under rules and regulations prescribed by the Board of Directors."

7 U.S.C. § 1506(k): "Contracts. The Corporation may enter into and carry out contracts or agreements necessary in the conduct of its business, as determined by the Board. State and local laws or rules shall not apply to contracts or agreements of the Corporation or the parties thereto to the extent that such contracts or agreements provide that such laws or rules shall not

apply, or to the extent that such laws or rules are inconsistent with such contracts or agreements."

7 U.S.C. § 1508(b)(3): "Review and approval by the Board. A policy or other material submitted to the Board under this subsection shall be reviewed by the Board and, if the Board finds that the interests of producers are adequately protected and that any premiums charged to such producers are actuarially appropriate, shall be approved by the Board for reinsurance and for sale to producers as an additional choice at actuarially appropriate rates and under appropriate terms and conditions taking into consideration the risks covered by the policy or other material. The Corporation may enter into more than one reinsurance agreement simultaneously to facilitate the offering of such new policies. Proposals made to the Board under this paragraph shall be considered as confidential commercial or financial information for purposes of section 552(b)(4) of title V, United States Code until approved or disapproved by the Board. The Board shall provide an applicant with notification of intent to disapprove a proposal not later than 30 days prior to taking such action. An applicant so notified may modify such application and such modification shall be considered an extension of the original application."

7 U.S.C. § 1508(h): "Reinsurance. The Corporation is directed, notwithstanding any other provision of this title, to provide reinsurance, to the maximum extent practicable, upon such terms and conditions as the Board may determine to be consistent with subsections (a) and (b) of this section and sound reinsurance principles, to insurers including private insurance companies or pools of such companies, reinsurers of such companies, or State or local governmental entities, including any political subdivisions thereof, that insure producers of any

agricultural commodity under a plan or plans acceptable to the Corporation. A test program of such reinsurance shall be made available, to the maximum extent possible, to begin not later than with the 1982 crops. In order to provide equity among producers purchasing crop insurance, whenever the Corporation provides reinsurance under this subsection to any such insurers, the Corporation shall pay a portion of each producer's premium for such insurance so reinsured. Each such payment shall cover the same per centum of the premium, and be subject to the same restrictions regarding payments of premiums for crop insurance on commodities, as provided in subsection (b) of this section for Federal partial payments of Federal crop insurance premiums. The Corporation shall also pay operating and administrative costs to insurers of policies on which the Corporation provides reinsurance to the same extent that such costs are covered by the Corporation on the Corporation's policies of insurance. Insurers of policies on which reinsurance is provided shall make use of licensed private insurance agents and brokers on the same basis as provided for policies of the Corporation under section 507(c)(3) of this title, except that the provisions for compensating agents and brokers from premiums paid by the insured shall not apply. Beginning with the 1992 reinsurance year (July 1, 1991, through June 30, 1992), the Corporation shall revise its reinsurance agreements with the reinsured companies so as to require the reinsured companies to bear an increased share of any potential loss under such agreement, taking into consideration the financial conditions of the reinsured companies and the availability of private reinsurance.

REGULATIONS INVOLVED

7 C.F.R. § 400.351: "Basis and applicability. The regulations contained in this subpart are issued pursuant to the

Appendix A

Federal Crop Insurance Act, as amended (7 U.S.C. 1501 et seq.) (the Act), to prescribe the procedures for federal preemption of State laws and regulations not consistent with the purpose, intent, or authority of the Act. These regulations are applicable to all policies of insurance, insured or reinsured by the Corporation, contracts, agreements, or actions authorized by the Act and entered into or issued by FCIC."

7 C.F.R. § 400.352(a): "State and local laws and regulations preempted. No State or local governmental body or non-governmental body shall have the authority to promulgate rules or regulations, pass laws, or issue policies or decisions that directly or indirectly affect or govern agreements, contracts, or actions authorized by this part unless such authority is specifically authorized by this part or by the Corporation."

7 C.F.R. § 400.401(b)(2): "These regulations are applicable to: (2) All holders of crop insurance policies sold by private insurance companies and reinsured by the FCIC under the provisions of an FCIC Standard Reinsurance Agreement or other FCIC reinsurance agreement; and all private reinsured companies, their contractors and subcontractors, including past and present officers and employees of such companies, their contractors and subcontractors."